No. 90-339 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,

Petitioner,

—v.—

JOHN E. JOHNSON, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where agreed upon and unobjected to New York legal standards form the basis for a punitive damage judgment, thereby leaving no legal issue, constitutional or otherwise, for this Court to review, should this Court consider the evidentiary sufficiency of plaintiffs' proofs, which, in any event, were ample, and which have already been passed upon by the jury, the trial court, and the Second Circuit?

2. Should this Court review the Second Circuit's holding that the trial court properly exercised its discretion in consolidating this case with another, essentially similar, asbestos product liability action, involving the same workplace, the same manner of injury, the same disease, and the same defendants, particularly where the jury was repeatedly cautioned to, and did, consider each case individually?

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STATEMENT OF THE CASE

Rarely will this Court encounter a matter less deserving of its review than this. For, stripped of its rhetoric, petitioner The Celotex Corporation ["Celotex"] asks this Court to do little else than rule upon the sufficiency of the evidence in support of the jury verdict in this single personal injury action. There is no issue of "controlling" state law. There is no issue of substantive federal law. Stated bluntly, review herein can have absolutely no precedential value to any other case, and would constitute a waste of this Court's resources.

Needless to state, the Second Circuit Court of Appeals and the trial judge below have each in turn affirmed the jury's verdict, and with ample legal and evidentiary basis. John Johnson, at age 65, was diagnosed with asbestosis and severe pleural thickening -- irreversible and progressively disabling lung disorders caused solely by exposure to asbestos.[1]

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[1] E.g., Joint Appendix in Johnson v. (continued...)

At trial, the overwhelming and largely uncontradicted evidence established not only the serious nature of Mr. Johnson's injuries,[2] but

[1](...continued)
Celotex Corp., Nos. 89-7484 and 89-7542 (2d Cir. 1990) at 521-522; 659; 719. Hereafter, references to the Joint Appendix will be stated as "J___."

[2] Petitioner's repeated suggestions to this Court that Mr. Johnson was not injured or ill were, of course, rejected by the jury, and contrary to the evidence. Mr. Johnson was not only diagnosed by his own treating physicians as having asbestosis, but petitioner's expert pulmonologist, Dr. Kamelhar, concluded that plaintiff had classic symptoms of asbestosis: increased parenchymal markings bilaterally [J915-916], extensive pleural calcifications on x-ray [J914-915]; and rales, or crackling sounds on auscultation [J916-917]. Medical testimony further established that Mr. Johnson is at an enhanced risk for developing cancer [J677-679, J705-707], and, accordingly, requires medical surveillance on an ongoing basis against this danger [J710]. Indeed, Mr. Johnson's treating doctors initially read his x-rays as showing a probable cancer, and so advised him. He accordingly submitted to a broncoscopy, which revealed precancerous squamous cells [J680]. Also revealed by biopsy was "septal fibrosis," a positive finding for asbestosis [J712-713].

Needless to add, Mr. Johnson described how his shortness of breath was becoming more pronounced with the passage of time [J38-39], and his wife described how he now tired with increasing frequency [J55]. In short, the jury was presented with ample evidence to permit it

(continued...)

also that a proximate cause of these injuries was Mr. Johnson's repeated exposure, while employed at the Brooklyn Navy Yard during World War II, to asbestos dust from products manufactured by Celotex's predecessor, the Philip Carey Company ["Carey"].[3]

More significantly for the purposes of this Petition, the proofs soundly established that Carey had, indeed, actual and concrete knowledge of the deadly characteristics of its asbestos product before and during the time Mr. Johnson was exposed. At trial Dr. Robert Ritterhoff, a well qualified pathologist, testified that in 1944 he performed an autopsy on a Carey worker, and concluded that the man's

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[2](...continued)
to conclude that Mr. Johnson has a significant asbestos caused disease, that he has suffered and still suffers serious physical disabilities, and that his condition is deteriorating.

[3] Appendix to Petition for Writ of Certiorari at 37a-40a. Hereinafter, citation to this Appendix shall be stated as: "Pet. App. ___."

death was due to asbestos.[4] At that time, Dr. Ritterhoff specifically warned Carey, through an appropriate corporate official, of his findings.[5]

Thus, although petitioner fails to reveal this crucial fact to the Court, the jury had before it explicit evidence that Carey actually knew of the dangers of its product by 1944. The premise at the heart of the Petition -- that the punitive damage verdict was based solely on so-called "state of the art" evidence -- is factually incorrect.

To be sure, compelling proofs further established that long before World War II, indeed by no later than 1930, it was universally known in industrial and medical circles that asbestos produced, after long latency

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[4] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

[5] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

periods, fatal or crippling lung diseases.[6] All

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[6] See, e.g., Pet. App. 44a. Indeed, evidence revealed that by as early as 1900 reports of asbestos-generated respiratory diseases were convincingly reported by Dr. Montague Murray, the Chief Inspector of Factories in the United Kingdom and had become the subject of Parliamentary concern [J1085-1088]. Moreover, as the uncontradicted proofs demonstrated, the medical literature grew year by year to a point where, by 1930, the full scale and exhaustive epidemiological studies of a Dr. Merewether conclusively established and widely publicized that asbestos dust in industrial settings produced asbestosis [J1191-1192, J1085]. Equally well established from this time onward was the insidious and vicious nature of this incurable, untreatable disease, which because of the long latency period between exposure and manifestation, did not become manifest or symptomatic until many years after exposure commenced [E.g., J1114-1115].

After 1930 there was continuing medical publicity concerning asbestos hazards from no less authorities than the United States Public Health Service (1938) [J1259, J1263-1269], the International Labor Organization and the United States Navy, which specifically recognized in a 1940 publication that asbestos was a potential occupational hazard for shipyard workers [J2625, J2634]. In this connection, petitioner's contention that in the World War II years there was no "state of the art" evidence that finished asbestos insulation products caused injury to shipyard workers is misplaced.

As if the foregoing awareness of the hazards of asbestos was not itself sufficient, the proofs also revealed that long before John Johnson's first exposure to asbestos dust in

(continued...)

told, the evidence richly supported a finding that Carey, secure in the knowledge that the human suffering that would result from its asbestos products would not become manifest for decades, recklessly and wantonly failed to warn workingmen like Mr. Johnson of these hazards.

Not surprisingly, the jury returned a verdict in respondents' favor, and rendered a compensatory damage award of $350,000.00 [$250,000.00 for Mr. Johnson on his personal injury claims, and $100,000.00 for Mrs. Johnson on her derivative claim for loss of consortium]

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[6](...continued)
1942, the carcinogenic nature of this dust was also well described and widely understood. The carcinogenic nature of asbestos had been reported as early as 1935 in leading medical journals [J1089]. Indeed, by 1942 this cancer link was so widely accepted that it had found its way into the basic medical textbooks on chest diseases, and was taught as basic medicine to medical students [J1089-1090]. Finally, Dr. Margaret Becklake, conceded by even defense experts to be a foremost epidemiologist and epidemiological historian addressing this subject [J1301], concluded that the link between asbestos exposure and cancer, which was first suspected no later than 1935, had been established as being probable no later than 1940 [J1304].

Pet. App. 32a. Moreover, having been carefully instructed by the trial judge, in accordance with well established New York law, that punitive damages must be based upon "wanton and reckless" misconduct, and determined by "clear and convincing" evidence, Pet. App. 44a, the jury returned a punitive damage award against Carey in the sum of $1,000,000.00. Pet. App. 32a.

Now, following the trial judge's denial of all post trial motions, and the Second Circuit's affirmance of the judgment in all respects, petitioner asks this Court to grant certiorari, claiming:

1. that the Second Circuit somehow misapplied New York law by permitting punitive damages to be based upon negligent [as opposed to reckless or intentional] misconduct, and "state of the art" evidence [as opposed to evidence that Celotex actually knew of the dangers of asbestos]; and

2. that the trial court somehow improvidently exercised its discretion in consolidating this case with that of another asbestos victim, John Higgins, where both cases involved the same disease; involved individuals who were injured in the same fashion, at the same worksite; had common defendants, and the same attorneys; were fully prepared and had been clustered together pursuant to a case management order; and where the jury was repeatedly cautioned to consider each plaintiff's case separately. Pet. App. 36a-37a.

Not only are these contentions each misguided, but as will be developed below, they are clearly unworthy of this Court's attention.

First of all, lest there be no confusion, petitioner concedes that the trial judge properly charged the jury concerning the legal standards for the award of punitive damages. Petition at 8. Indeed, no objection was raised at trial, post-trial, or on appeal that this

charge was in any way at odds with New York law. Pet. App. 44a.

Under these circumstances, it is disingenuous at best for petitioner, in an attempt to engage this Court's attention, to cast its argument in the guise of claimed abrogations of "controlling New York law." For the purposes of this case, there is no question but that the jury's verdict was predicated on the appropriate legal standards.

Upon scrutiny, petitioner's argument boils down to one of fact -- that the punitive damage award was somehow not supported by the evidence. To that end, petitioner makes much of the Second Circuit's deletion of a phrase from its original opinion. As will be developed below, however, the circuit court quite properly found the evidence sufficient to support the verdict under the law as charged. For, even assuming arguendo that a punitive damage award requires proof of intentional misconduct, the testimony of Dr. Ritterhoff established

that Carey, in fact, knew of the dangers of its product when it failed to warn Mr. Johnson.

Of course, the circuit court's cosmetic editing of its opinion did not alter its holding one iota, and is in itself no basis to invoke the review of this Court in a matter so mundane as judicial review of the sufficiency of evidence in a single personal injury action.

Turning to petitioner's remaining contention, it need hardly be stated that the consolidation of two essentially similar cases for trial is a sound and proper exercise of a trial court's discretion, as the circuit court properly held. Pet. App. 37a.

For the reasons to be developed more fully below, this writ should be denied.

REASONS FOR DENYING THE WRIT

I

THIS COURT SHOULD NOT UNDERTAKE TO REVIEW THE SUFFICIENCY OF THE EVIDENCE SUPPORTING THE PUNITIVE DAMAGE AWARD, WHICH WAS PROPERLY UPHELD BY THE SECOND CIRCUIT IN ACCORDANCE WITH AGREED UPON NEW YORK LEGAL STANDARDS

In asking this Court to review or to vacate the jury's punitive damage award, Celotex attempts to fashion an argument that the Second Circuit somehow "misapprehended and misapplied the controlling New York law." Petition at i, 8, 17. It could not be clearer, however, that the Second Circuit invoked precisely the legal standard for punitive damages which was articulated by the trial judge, and unobjected to by petitioner at trial, on appeal, or indeed, in this very proceeding. See Petition at 8.

The circuit court's opinion reads, in unequivocal terms:

> [T]he trial judge informed the jury in his charge that punitive damages may be awarded if plaintiffs "clearly and convincingly established that the acts of a defendant [the jury was] considering causing the injury you [sic] complained of were wanton and

> reckless." Joint Appendix at 2123. An act was defined as wanton and reckless when "done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the results upon the rights and safety of others that may flow from doing the act, or in the manner in which it is done." Id. at 2124. No claim has been made by appellants that this charge was not in accordance with New York law.

Pet. App. 44a. (Emphasis supplied.)

Having thus set forth the applicable legal principles, the Second Circuit undertook a review of the evidence and held "that the award of punitive damages was supported by the evidence as a matter of law." Pet. App. 44a. In so doing, the circuit court quite properly made reference to certain of plaintiff's proofs, and determined that:

> The jury was free to consider from this and other evidence presented that appellants knew of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner.

Pet. App. 44a. (Emphasis supplied.)

Without doubt, then, the Second Circuit measured the evidence against the appropriate -- indeed, the conceded -- legal yardstick, and petitioner's assertion that the court "misapprehended New York law" is nothing short of specious.

Equally specious is the argument that the Second Circuit's editing of the phrase "should have known" from its original draft of the last quoted paragraph alters in any way the soundness of the result reached. For, even assuming for the purposes of this argument that the "should have known" formulation, taken alone, would be no basis for punitive damages,[7] the

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[7] Respondents do not concede that gross negligence alone is an insufficient basis for punitive damages, as there are, indeed, New York authorities to this effect. See, e.g., Soucy v. Greyhound Corp., 27 App.Div.2d 112 (3d Dep't 1967); Cleghorn v. New York C. & H. R.R. Co., 56 N.Y. 44 (1874). Be that as it may, the question of New York's legal prerequisite for the imposition of punitive damages is not a subject for consideration by this Court, since the trial judge's more stringent "wanton and reckless" charge, which was unobjected to at every stage of this action, is the law of the case, and the basis upon which the jury rendered its verdict.

fact remains that the circuit court had before it compelling evidence that Celotex, in fact, knew of the hazards of asbestos in 1944, at a time when John Johnson and other unsuspecting workingmen were inhaling its deadly asbestos fibers at the Brooklyn Navy Yard.

At trial, Dr. Robert Rittenhoff, a well qualified pathologist, gave testimony that in 1944, on autopsying a Carey employee, he concluded that the cause of death was inhalation of asbestos fibers.[8] More importantly, according to this witness, he was so impressed by this finding that he took the trouble to travel to a Carey facility and so inform an appropriate Carey corporate representative.[9]

Thus, Celotex had actual and concrete knowledge of the hazards of asbestos during the

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[8] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

[9] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

period of Mr. Johnson's exposure. Accordingly, even setting aside the compelling "state of the art" proofs, Dr. Ritterhoff's testimony was more than sufficient to support a finding that Celotex actually knew of the dangers of its product, such that its failure to warn Mr. Johnson was reckless and wanton under the law as charged. Under these circumstances, the circuit court's editing of the "should have known" phrase was of absolutely no moment.

In its Petition, Celotex purports to read the circuit judges' minds, asserting that the majority "did not consider what Celotex actually knew." Petition at 13. That petitioner chooses to ignore the proofs of its actual knowledge, and fails even to bring this crucial evidence to the attention of this Court, is certainly no reason to suppose that the Second Circuit was not cognizant of the complete evidentiary record. Respondents most certainly presented these proofs quite pointedly to the circuit court in their brief.

Apparently, Celotex takes the absurd view that in its opinion upholding the sufficiency of the evidence the circuit court was required to list and describe every single shred of proof that tended to support the verdict. In this case particularly, given the enormous wealth of evidence documenting the misconduct of Celotex and its codefendant, see, e.g., footnote 6, supra, such an all-inclusive recounting of the proofs would hardly have been practicable, and certainly was not required.

To be sure, the circuit court, after citing to certain salient aspects of the evidence, made explicit reference to "other evidence presented" as further basis for sustaining the verdict. Pet. App. 44a. Undoubtedly, this "other evidence" included the testimony regarding Celotex's actual knowledge of the hazards of its product.

Lest there by any doubt in the matter, even apart from Celotex's actual knowledge, the devastating state of the art proofs were more

than ample to permit a jury to conclude either that petitioner, as an expert,[10] must have known of these open and notorious dangers, and that protestations to the contrary are incredible and not worthy of belief -- or alternatively, that Celotex's failure to have learned of these obvious hazards was itself an ostrich-like act of considerable recklessness and depravity.

Nor is there any merit to petitioner's argument that Mr. Johnson's status as a shipyard worker, as opposed to a plantworker, somehow makes the verdict unsustainable as a matter of law. First of all, there was, indeed, "state of the art" evidence presented which documented a recognition by at least 1940 -- two years before Mr. Johnson began to work at the Brooklyn Navy Yard -- that asbestos was a

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[10] By the time of Mr. Johnson's exposure, Carey had been in the asbestos business for decades, having first entered the field in 1906. Moreover, Carey was a large industrial concern endowed with the usual coterie of physicians, industrial hygienists and the like [e.g. J1651 et seq.; J1507 et seq.]

potential hazard for shipyard workers. [E.g., J2625, J2634]. Petitioner's repeated assertion to the contrary is factually in error.

But more to the point, especially in light of the evidence of Celotex's actual knowledge, by 1944, that inhaled asbestos could result in death, it was altogether reasonable for the jury to conclude that Celotex had a duty [which it recklessly breached], at least by 1944, to warn all persons who might possibly come into contact with the deadly fibers. As the Second Circuit, no doubt, concluded in upholding the punitive damage award, it hardly requires absolute certainty of harm to trigger the duty to warn of a known or even suspected hazard. Indeed, the trial judge correctly instructed the jury, again without objection from petitioner, that:

> [t]he greater the <u>potential</u> hazard of the product of which the manufacturer knew or reasonably should have known, the more extensive must the manufacturer's efforts be to avoid injury by making that hazard

> known to the reasonably foreseeable users.

[J2106]. (Emphasis supplied).

Thus, the jury was free to conclude that the duty to warn, especially given the terrible potential consequences of asbestos-related disease, was triggered as soon as the possibility, let alone the probability, of these cause and effect relationships became known. Here once again, it was entirely reasonable for the jury to determine, as a factual matter, that Celotex's failure to warn was reckless, wanton, or depraved.

In the final analysis, what Petitioner seeks is to have this Court review *de novo* the sufficiency of the evidence to support the punitive damage award in this single personal injury action. Such an undertaking would have absolutely no precedential value, since every action must, of course, rest on its individual evidentiary record. Nor does the petition present any legal issue at all, let alone one

that might merit this Court's attention. Accordingly, this writ should be denied.

II

THE SECOND CIRCUIT'S AFFIRMANCE OF THE CONSOLIDATION FOR TRIAL OF TWO ESSENTIALLY SIMILAR ACTIONS WAS ENTIRELY PROPER, AND IN NO WAY WARRANTS REVIEW BY THIS COURT

The Second Circuit panel was unanimous in upholding the consolidation of the Johnson matter with that of John Higgins, and with good reason. From a factual perspective, the logic of consolidating these two cases was unassailable. Both cases involved the same worksite (the Brooklyn Navy Yard), the same defendants, the same disease (asbestosis), and the same work status as "bystanders" who did not directly handle asbestos products but worked side by side with those who did. Pet. App. 36a-37a. Accordingly, as the trial record richly

reveals, the great bulk of the proofs were commonly relevant to both cases.[11]

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[11] It is well to note that the passage of New York's one-year revival statute for asbestos-related (and certain other) toxic torts, 1986 N.Y. Laws, ch. 682 § 4, produced "unparalleled litigation," Pet. App., 30a-31a, resulting in severe problems of docket control. To manage this deluge of cases, all actions filed in the Southern and Eastern Districts were assigned to Judge Charles P. Sifton for pretrial proceedings. Judge Sifton, who presided over the Johnson/Higgins trial, and was from experience fully knowledgeable of the nature of the Brooklyn Navy Yard proofs, expressed his reasons for ordering the consolidation as follows:

> It seems to me that they are appropriately consolidated, and I'll direct that they go forward together.
>
> It seems to me that the potential confusion is much less than one might suppose before having experience with the trial of some of these cases arising out of the Navy Yard. The significance of the common work site does seem to me quite telling, that in that they both arise out of a common work space and environment.
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> * * *
>
> I think it's also worthy to note that these are but two of some 25 cases in which both plaintiffs and defendants undertook to be trial ready in the month of November, principally because of the last minute

(continued...)

In disposing of petitioner's objections to the consolidation of these cases, the Second Circuit reviewed the wealth of legal authority which accords a trial judge, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, broad discretion to determine whether consolidation is appropriate.[12] Pet. App. 34a-36a.

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[11](...continued)
settlement posture that everyone seems to have been assuming.

> The Court in this district and the Southern District are being thoroughly taxed. Some considerations of efficiency are very important. Discovery is completed. I have the pretrial submissions in both cases and I've had them for a period of time.
>
> * * *
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> There are as I note a considerable number of common factual and legal issues. The matter of trial time is extraordinarily important and, accordingly, I'll direct that the two cases be consolidated for trial. [J1768-J1770].

[12] E.g., Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492 (11th Cir. 1985); Arnold v. Eastern Airlines, Inc., 681 F.2d 186 (4th Cir. 1982) cert den., 460 U.S. 1102 (1983).

The circuit court went on to note that absent "a clear abuse of discretion" the trial judge's decision to consolidate may not be disturbed on appeal. Pet. App. 37a. Petitioner does not dispute these well settled legal authorities, but complains, rather, that as a factual matter the partial difference in periods of exposure alone made consolidation improper and deprived it of a fair trial.

First of all, as the circuit court duly noted, the trial judge carefully and repeatedly instructed the jury to treat each case separately:

> Instructions were given throughout the trial and in the charge to caution the jury to consider each plaintiff's claims individually. Two separate verdict forms were provided to the jury, one for Johnson, the other for Higgins . . . . [T]he court acted throughout in a manner which insured that each plaintiff's claim was considered separately.

Pet. App. 37a.

Moreover, there is no reason to suppose that the jury was not equal to the task of

evaluating each case independently from the other. Nor was there any lack of evidence of Celotex's wrongdoing during the years of Mr. Johnson's exposure. See Point I, supra. In short, there is no basis for the suggestion that the jury was in any way influenced by the Higgins-only proofs when it rendered the altogether proper verdict for Mr. Johnson.

But more to the point, a factual inquiry into the pros and cons of a trial judge's consolidation of two cases with obvious and overriding similarities is hardly the kind of exercise worthy of this Court's attention. Here, the Second Circuit carefully marshalled the law and the facts, and concluded unanimously that consolidation was proper. A review by this Court would frankly be a waste of its time.

CONCLUSION

For the foregoing reasons, respondents urge that the Petition for A Writ of Certiorari be denied in all respects.

Respectfully submitted,

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